IN THE SUPREME COURT OF THE STATE OF NEVADA

THE ESTATE OF MURIEL WOOD; JOHN WOOD; JACKIE WAGNER; AND SHERRY TOBIN,
Appellants,
vs.
ROBERT GATLIN, M.D.,
Respondent.

No. 44921

FILED

APR 09 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a motion for a new trial and a post-judgment order awarding costs in a medical malpractice action. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

Appellants Estate of Muriel Wood, John Wood, Jackie Wagner, and Sherry Tobin (collectively, "Wood") filed this action against respondent, Dr. Robert Gatlin, and a second doctor, Gary Mono. Wood settled the claims against Dr. Mono before trial. At trial, the jury returned a verdict in favor of Dr. Gatlin. Wood then filed motions for new trial and judgment notwithstanding the verdict (JNOV), which the district court denied. This appeal followed.

Wood raises five issues on appeal. First, she contends that the district court abused its discretion in allowing Gatlin to reveal to the jury that Dr. Mono was previously a defendant in the action. Second, Wood argues that she is entitled to a new trial because Gatlin failed to rebut the presumption of negligence that arises when a doctor performs a surgical procedure on the wrong part of a patient's body. Third, Wood contends that the district court abused its discretion in refusing to read Nevada Pattern Jury Instruction 6.18. Fourth, she argues that the district court abused its discretion in allowing Gatlin to read the deposition testimony of

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Dr. Libke. Fifth, Wood contends that the district court erred in dismissing her gross negligence and battery claims.

We will discuss each of Wood's arguments, in turn, below. The parties are familiar with the facts, and we do not recount them except as necessary to our disposition. For the following reasons, we affirm.

NRS 17.245

First, Wood argues that evidence of Dr. Mono's settlement was inadmissible at trial in light of NRS 17.245. We have repeatedly held that it is within the district court's sound discretion to admit or exclude evidence, and thus, we review such decisions for an abuse of discretion or manifest error.[1]

NRS 17.245(1)(a) allows a plaintiff to settle with one tortfeasor without extinguishing rights against additional tortfeasors.[2] However, to prevent improper jury speculation, "the parties may not inform the jury as to either the existence of a settlement or the sum paid."[3] Still, "either party is entitled [to impeach any testifying witness by showing] any relevant fact which would or might tend to establish ill feeling, bias,

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[1]Thomas v. State, 122 Nev. ___, ___, 148 P.3d 727, 734 (2006).

[2]NRS 17.245(1)(a); Banks v. Sunrise Hospital, 120 Nev. 822, 843, 102 P.3d 52, 67 (2004).

[3]Banks, 120 Nev. at 843-44, 102 P.3d at 67. This court has reversed a verdict when the district court instructed the jury as to a prior settlement with an absent tortfeasor. Moore v. Bannen, 106 Nev. 679, 681-82, 799 P.2d 564, 566 (1990). On the other hand, this court upheld a verdict when the defendant merely pointed the blame at a prior settling defendant but did not elicit testimony or expose the jury to the fact that the prior defendant had entered into a settlement agreement. Banks, 120 Nev. at 844, 102 P.3d at 67.

motive, interest, or animus on the part of [the witness] against the party, and great latitude should be allowed in showing such facts."[4] Accordingly, NRS 48.105, which precludes evidence of offers to compromise at trial, specifically permits the admission of settlement/compromise evidence for purposes of demonstrating bias or prejudice.

In this case, Dr. Mono testified on cross-examination that, at one point, he was a defendant in the case. However, neither Gatlin nor Mono used the term "settlement." In addition, Gatlin "did not elicit testimony or expose the jury to the fact that [Dr. Mono] had entered into settlements . . . nor did [he] mention the sum paid."[5]

Because Wood called Dr. Mono as a witness, Gatlin had the right to impeach him. The fact that Dr. Mono was a defendant in the action was highly relevant to the issue of whether Mono changed his description of Mrs. Wood's injuries to avoid personal liability. Thus, we conclude the district court did not abuse its discretion in admitting the evidence in question.[6]

Presumption of negligence

Second, Wood argues that the district court abused its discretion in denying her motion for a new trial because Gatlin failed to

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[4]81 Am. Jur. 2d Witnesses § 842 (2006). "A traditional method of impeachment is to demonstrate that a witness harbors bias or prejudice toward one of the parties or a personal interest in the outcome of the trial which can be expected to color his or her testimony and undermine its reliability." Id.

[5]Banks, 120 Nev. at 844, 102 P.3d at 67.

[6]We conclude that Wood's other arguments on this issue (i.e., that the evidence in question violated NRS 41.141(3) and was unfairly prejudicial) are without merit.

rebut the applicable presumption of negligence. "We review a district court's denial of a new trial motion for an abuse of discretion."[7]

Pursuant to NRS 41A.100(1)(e) and NRS 47.180(1), the district court instructed the jury that, because a surgical procedure was performed on the wrong part of Mrs. Wood's body, Gatlin had the burden of proving, by a preponderance of the evidence, that his negligence did not cause her death. After a careful review of the record, we conclude that the evidence presented by Gatlin was sufficient to rebut this presumption of negligence, and thus, the district court did not abuse its discretion in denying Wood's motion for new trial.

NPJI 6.18

Third, Wood contends that the district court abused its discretion when it refused to read NPJI 6.18 to the jury. For this instruction to be proper, however, the medical care provider must have failed to rebut the applicable presumption of negligence as a matter of law.[8] In this case, Gatlin presented substantial evidence rebutting the applicable presumption of negligence, and the district court did not decide the issue as a matter of law. As a result, Wood's argument is without merit.

Deposition testimony of Dr. Libke

Fourth, Wood contends that the deposition testimony of Dr. Libke, a general surgeon, lacked proper foundation because he is not a gynecologist and there was no evidence offered by Gatlin that a general surgeon's standard of care is similar to that of a gynecologist, as required

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[7]Banks, 120 Nev. at 840, 102 P.3d at 65 (2004).

[8]See State Bar of Nevada, Nev. J.I. 6.18, at 95 (1986).

by NRS 41A.100(2).[9] This court reviews a district court's decision to admit expert testimony for an abuse of discretion, and it will only reverse a district court's decision to admit expert testimony on a showing of a clear abuse of discretion.[10]

NRS 41A.100(2) provides, in part, that expert medical testimony establishing a standard of care "may only be given by a provider of medical care who practices . . . in an area that is substantially similar to the type of practice engaged in at the time of the alleged negligence." In this case, Dr. Libke testified that bowel injuries occur frequently in the absence of negligence, and that the injury to Mrs. Wood was of the type that is a known and accepted risk of abdominal surgery. This testimony did not set forth a NRS 41A.100 standard of care, but rather demonstrated the commonality of bowel injuries during abdominal surgery. Thus, Dr. Libke's deposition testimony did not violate NRS 41A.100(2), and the district court did not abuse its discretion in permitting Gatlin to read the testimony in question.

Dismissal of Wood's battery and gross negligence claims

Fifth, Wood contends that the district court erred when it granted Gatlin's Rule 41(b) motion made at the close of evidence, thereby dismissing her battery and gross negligence claims.

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[9]Although Wood mentions in her brief that it was an abuse of discretion to admit the testimony of both Dr. Libke and Dr. Seid, she presents no substantive arguments with respect to Dr. Seid's testimony. Thus, to the extent Wood claims it was an abuse of discretion to admit the testimony of Dr. Seid, we conclude her argument is without merit.

[10]Krause Inc., v. Little, 117 Nev. 929, 933-34, 34 P.3d 566, 569 (2001).

At the time this case went to trial, NRCP 41(b) authorized the defendant to move for involuntary dismissal at the close of the plaintiff's evidence if the plaintiff failed to prove a sufficient case for the jury.[11] This court reviews dismissals with prejudice pursuant to NRCP 41(b) under a "heightened" standard of review: a claim should not be dismissed unless it appears to a certainty that the plaintiff is not entitled to relief under any set of facts that could be proved in support of the claim.[12] Thus, in ruling on Gatlin's Rule 41(b) motion, the district court was required to accept Wood's evidence as true, draw all permissible inferences in her favor, and not assess the credibility of the witnesses or the weight of the evidence.[13]

Wood's battery claim

With respect to her claim for battery, Wood contends that Gatlin removed an ovary and fallopian tube (i.e., performed a salpingo-oophorectomy) without consent, and that she presented evidence of this fact at trial.

"It is well settled that a physician who performs a medical procedure without the patient's consent commits a battery irrespective of the skill or care used."[14] "In the medical context, the law has developed the doctrine of informed consent, which requires a patient's consent be an informed consent to be effective and imposes a duty on the physician to

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[11]NRCP 41 (amended 2004).

[12]J.A. Jones Constr. v. Lehrer McGovern Bovis, 120 Nev. 277, 290, 89 P.3d 1009, 1018 (2004).

[13]Id.

[14]Conte v. Girard, 132 Cal.Rptr.2d 855, 859 (Ct. App. 2003); see e.g., Corn v. French (1955) 71 Nev. 280, 289 P.2d 173 (patient consented to exploratory surgery; doctor performed a mastectomy).

provide material information about any proposed treatment, such as risks and alternative procedures."[15] Notably, NRS 41A.110 provides that the consent of a patient is conclusively established if the patient signs a statement describing the procedure, the risks, and possible alternatives after a physician has explained those details in person.

While Gatlin did not produce a document signed by Mrs. Wood describing the salpingo-oophorectomy, and therefore failed to establish consent conclusively, NRS 41A.110 does not shift the burden of proving a lack of consent. We conclude that the evidence produced by Mrs. Wood was insufficient to raise a jury question as to a lack of consent, and thus, the district court did not err in dismissing her battery claim.[16]

Wood's gross negligence claim

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[15]Conte, 132 Cal.Rptr.2d at 859. NRS 449.710(6) provides every patient with the right to receive from her physician the information necessary for her to give her informed consent to a procedure or treatment including, in non-emergency situations:

> (a) A description of the significant medical risks involved;
>
> (b) Any information on alternatives to the treatment or procedure if he requests that information;
>
> (c) The name of the person responsible for the procedure or treatment; and
>
> (d) The costs likely to be incurred for the treatment or procedure and any alternative treatment or procedure.

[16]Separately, Wood claims that Gatlin committed a battery when he injured her small bowel during surgery. However, numerous forms signed by Mrs. Wood list such an injury as a possible risk of surgery. Thus, Wood's argument fails.

With respect to her claim for gross negligence, Wood asserts that she established a jury issue based on her expert witness's testimony that (1) there was no consent for the salpingo-oophorectomy, (2) the small bowel transection should not have occurred, (3) there was excess blood loss during the initial hysterectomy, and (4) Dr. Gatlin should have known from the start that the vaginal approach to Mrs. Wood's hysterectomy was not a viable option.

Our previous cases make clear that:

> "'[g]ross negligence is substantially and appreciably higher in magnitude and more culpable than ordinary negligence. Gross negligence is equivalent to the failure to exercise even a slight degree of care. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight diligence, or the want of even scant care.'"[17]

Wood failed to present any evidence suggesting the absence of slight diligence or the want of even slight care. Instead, she focused her evidence on the traditional standard of care applicable to gynecologists performing hysterectomies. We thus conclude that Wood failed to raise a jury question on her gross negligence claim.

Conclusion

For the reasons stated above, we

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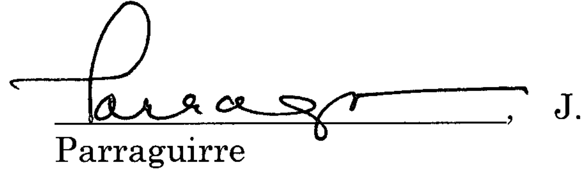
[17]Bearden v. City of Boulder City, 89 Nev. 106, 109, 507 P.2d 1034, 1035 (1973) (quoting Hart v. Kline, 61 Nev. 96, 98, 116 P.2d 672, 674 (1941)).

ORDER the judgment of the district court AFFIRMED.[18]



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Parraguirre

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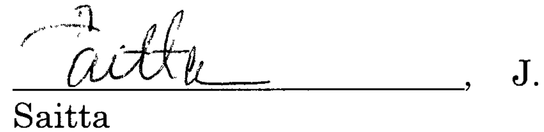

_______________, J.
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cc: Hon. Lee A. Gates, District Judge
William C. Turner, Settlement Judge
Leslie Mark Stovall
Jimmerson Hansen
Clark County Clerk

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[18]To the extent that Wood appeals from the order denying JNOV, that order is not appealable. Krause Inc., v. Little, 117 Nev. 929, 933, 34 P.3d 566, 569 (2001).

Separately, Wood appeals from the order awarding costs to Gatlin. However, Wood's appeal from that order is limited to her request that we vacate the award of costs if we reverse the judgment of the district court. Because we affirm the judgment of the district court, we also affirm the award of costs.